Filed 11/12/15 P. v. Kirkpatrick CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. AARON KIRKPATRICK et al., Defendants and Appellants.	B256477 (Los Angeles County Super. Ct. No. BA389227)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert Perry, Judge. Affirmed.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant Aaron Kirkpatrick.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant Keon Kirkpatrick.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Aaron and Keon Kirkpatrick were convicted of second degree murder committed to benefit a criminal street gang. On appeal, they contend the gang expert improperly relied on hearsay in forming his opinion and an instruction should have been given regarding imperfect self-defense. We reject both contentions and affirm.

BACKGROUND

On the afternoon of May 16, 2011, appellants, both members of the Black P-Stones street gang, approached Kirk Torres, a member of the Rolling 30's Crip street gang, in Los Angeles, and an altercation ensued. A witness testified that "it happened so fast it didn't seem like a normal fight. It happened and it seemed like [appellants] presented themselves to [Torres] and the fight instantaneously took place." "Directly after the fight ensued," appellants shot Torres eight times—including at least once in the back as he ran away with his hands in the air and three times after he had fallen to the ground—killing him. Police recovered nine shell casings and two bullets from two different guns from the scene, but no guns.

Appellants were arrested and charged with gang-related murder, and it was alleged they used firearms to commit the murder. (Pen. Code, §§ 187, 186.22, subd. (b)(1)(C), 12022.53, subds. (d)-(e).)

At trial, Los Angeles Police Detective Robert Smith testified as a gang expert. Smith had been a Los Angeles police officer for eight years and a gang officer for three. He grew up in a family of gang members, and as a police officer took several classes and attended numerous conferences on gangs. He frequently interviewed gang members and their associates, from whom he gained information about the gangs and their culture, organization, territories, and the crimes they committed, spoke to other officers who worked with gangs, and had access to "field identification cards" that officers commonly filled out upon making contact with gang members and others. A field identification card typically lists known or suspected gang members and their monikers, vehicles, employment status, and contact information.

Smith testified the Blood gangs and its cliques, including the Black P-Stones, are rivals of the Crip gangs and its cliques. The shooting occurred in Rolling 30's Crip territory.

Smith opined Aaron was a member of the Black P-Stone gang based on his gang-related tattoos and recorded conversations from jail in which he mentioned the gang's name and used its terminology. He opined Keon was a Black P-Stone gang member based on his tattoos and apparel and his use of gang slang in recorded calls. Torres was a Crip member, and had several gang-related tattoos.

In Smith's opinion, if two or more Black P-Stone gang members were to drive into a rival gang's territory, they would be armed for their own protection and could expect to be assaulted by rival gang members, as gangs consider themselves at war with their rivals. Robbing a rival gang member in his own territory would elevate the status of the opposing gang members and the gang as a whole.

After hearing a hypothetical based on the facts of the shooting in this case, Smith opined the hypothetical robbery and shooting would have been committed in association with and for the benefit of the shooters' gang. The shooters would be willing to commit such a crime to show their allegiance to the gang.

Aaron denied participating in the shooting. Keon offered no pertinent evidence.

Appellants were convicted of second degree murder and it was found the crime was gang-related and committed with firearms. They were sentenced to 15 years to life in prison plus 25 years to life for the gun enhancement. They timely appealed.

DISCUSSION

Aaron Kirkpatrick, joined by Keon, contends his Sixth Amendment right to confront witnesses was violated when Detective Smith was permitted to offer testimony that "included and relied on" out-of-court statements made by other police officers and gang members. The argument is without merit because Smith's testimony included no out-of-court statement.

A. Gang Expert Testimony

An expert witness may base an opinion on "matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (Evid. Code, § 801, subd. (b).) A gang expert may rely on reliable hearsay evidence to form an opinion, even if the evidence would otherwise be inadmissible. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944-946; *People v. Gardeley* (1996) 14 Cal.4th 605, 617-618.) It is well established that such sources may include conversations with police officers and gang members, as well as written material. (*Gonzalez*, *supra*, at p. 949; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *Gardeley*, *supra*, at p. 620; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1122-1126; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209-1210; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9.) Our review is for abuse of discretion. (*Hill*, *supra*, at p. 1122.)

The trial court here did not abuse its discretion in admitting Detective Smith's opinions. He had been a police officer for eight years, including three years in a gang enforcement division. He had training on gangs and maintained regular contact with gang members, gathered intelligence on gangs in Los Angeles, identified and tracked gang members and their activities, and worked with other officers in investigating gang-related crimes. In informing and rendering his opinion, Smith thus relied on the same types of information the courts have found appropriate for gang expert testimony—written materials and conversations with officers and gang members. (*People v. Hill*, *supra*, 191 Cal.App.4th at pp. 1124-1125.) This was proper under California law.

Whether it would have been proper for Smith's testimony to *include* hearsay, i.e., for him to have repeated what was said by his sources, is an issue currently under review by our Supreme Court. (*People v. Sanchez* (2014) 223 Cal.App.4th 1, rev. granted May 14, 2014, S216681.) But the issue is inapposite here because our review of the 50 pages

of the reporters transcript that set forth Smith's testimony reveals not a single hearsay statement. Appellants certainly identify no such statement, nor did they object on hearsay grounds below. They argue only that it is "unclear" what information Smith relied on and how much of his testimony was based on personal knowledge and how much on hearsay, and therefore the reliability of his sources is questionable. These were matters for cross-examination, not appeal. In any event, we perceive nothing particularly unclear or unusual about Smith's testimony: He straightforwardly listed his qualifications and experience, identified several of sources on which gang experts typically rely, and stated he relied on that experience and those sources to form the opinion he gave. Admission of his testimony was proper.

B. Imperfect Self-Defense Instruction

Appellants contend the trial court prejudicially erred in refusing to give an instruction on imperfect self-defense as an alternative defense theory. We review claims of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

"[A] trial court in a criminal case is required—with or without a request—to give correct jury instructions on the general principles of law relevant to issues raised by the evidence." (*People v. Mutuma* (2006) 144 Cal.App.4th 635, 640.) The trial court has a duty to instruct sua sponte regarding a defense """if it appears that the [appellant] is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the [appellant's] theory of the case."""" (*People v. Maury* (2003) 30 Cal.4th 342, 424.) Substantial evidence is that which, if believed, would be sufficient for a jury to find a reasonable doubt as to defendant's guilt. (*People v. Michaels* (2002) 28 Cal.4th 486, 529.)

Self-defense against an assault requires an actual and reasonable belief in the need to defend against an imminent danger of bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Jefferson* (2004) 119 Cal.App.4th 508, 518.) The trier of fact "must consider what 'would appear to be necessary to a reasonable person'" in the position of appellant, with the appellant's knowledge and awareness. (*Humphrey*, at pp. 1082-1083.) CALCRIM No. 3470 provides in pertinent part that a defendant acts in

lawful self-defense and is not guilty of assault, if (1) he reasonably believes he was in imminent danger of suffering great bodily injury; (2) he reasonably believes the immediate use of force was necessary to defend against that danger; and (3) he uses no more force than was reasonably necessary to defend against that danger. CALCRIM No. 3474 instructs that the right to use force in self-defense continues only until the danger no longer exists or reasonably appears to exist.

Pursuant to the *imperfect* self-defense doctrine, an actual but *unreasonable* belief in the need to defend oneself from imminent danger of death or great bodily injury negates the mental state of malice aforethought and reduces a killing from murder to voluntary manslaughter. (*People v. Randle* (2005) 35 Cal.4th 987, 990, 994, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.)

CALCRIM No. 3471 instructs that an initial aggressor has a right to self-defense only if he has tried to stop fighting, he has communicated that to his opponent, and he has given his opponent an opportunity to stop. It charges a jury to make a preliminary determination of whether the person needing protection was the initial aggressor. An aggressor whose victim fights back in self-defense may not invoke the doctrine of self-defense against the victim's legally justified acts. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.) If the aggressor attempts to break off the fight and communicates this to the victim, but the victim continues to attack, the aggressor may then use self-defense against the victim to the same extent as if he or she had not been the initial aggressor. (§ 197, subd. (3); *People v. Trevino* (1988) 200 Cal.App.3d 874, 879; see CALCRIM No. 3471 ["Right to Self-Defense: Mutual Combat or Initial Aggressor"].) In addition, if the victim responds with a sudden escalation of force, the aggressor may legally defend against the use of force. (*People v. Quach* (2004) 116 Cal.App.4th 294, 301-302; see CALCRIM No. 3471.)

The question whether the trial court erred in refusing to instruct the jury on the self-defense theory turns on whether the record contains substantial evidence that if believed by the jury would raise a reasonable doubt as to whether appellants shot Torres in an effort to defend themselves. Appellants argue the trial testimony of Demetri Ross,

Adam Weatherall, and Norene Shaw supported the theory that they defended themselves when Torres attacked them.

Ross, appellants' acquaintance, testified Aaron told him on the night of the incident that Keon approached Torres and pulled a gun in order to rob him, and when Torres "tried to fight," Keon shot him. At closing argument, Aaron's and Keon's attorneys urged the jury to disregard Ross's testimony.

Weatherall, who was working on the roof of a nearby Burger King when the shooting occurred, testified he "saw two men approaching another man and then a fight ensued. And then directly after the fight ensued, [he] saw gunshots ring out between the two parties," and the solitary man was hit. Weatherall was a bit unclear as to who was shooting at whom, testifying both that "one individual actually discharge[ed] a firearm" but also that "two men" were "firing at each other, but there was three men in the fight," and "one man that was partnered with the other man did not—[was not] also engaged in the shooting . . . . [but] seemed as though he was trying to stop the shooting or like he didn't want the fight to go to that level it seemed like." He testified, "At first there was a fight, and everyone was involved in the fight, all three individuals." The fight "happened so fast it didn't seem like a normal fight. It happened and it seemed like two people presented themselves to another person and the fight instantaneously took place." Weatherall testified he did not see the shooters' vehicle.

Shaw, Aaron's girlfriend, admitted at trial that she told police Aaron had told her on the day of the shooting that he and Keon were driving her rental car when "'this guy pulled up'" to them, drew a gun, and tried to shoot them. Aaron told her, "'we had to do what we had to do.'" Shaw also admitted she told police Keon had told her on the day of the shooting that he shot Torres after he "came around from the alley," looked at them, looked at the car, then pulled his gun and shot at them. Immediately after these admissions, Shaw testified the statements she gave to police were untrue. Aaron's and Keon's attorneys urged the jury to disregard them.

Appellants contend the testimony of Ross, Weatherall and Shaw constitutes substantial evidence that Torres attacked appellants before they shot him, which was an

adequate predicate for self-defense, which necessitated an imperfect self-defense instruction.

We conclude no substantial evidence indicated Torres initiated or escalated any violence. Ross certainly offered none, as his testimony was only that Aaron told him Torres "tried to fight" after Keon pulled a gun in order to rob him. Imperfect self-defense "may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack . . . is legally justified." (*In re Christian S., supra*, 7 Cal.4th at p. 773, fn. 1.) For his part, Weatherall testified only that "a fight" ensued immediately upon Aaron and Keon bracing Torres. Although Weatherall testified Torres was "involved" in the fight, nothing suggested he took any aggressive action before being shot. And his testimony that Torres may have been one of the men firing a weapon was not only vague, it contradicted the fact that no gun was found by his body. Ross, in stories she told police but recanted at trial, stated that Aaron and Keon told her Torres attacked them while they were driving in her car. But no evidence suggested that Torres was shot from Shaw's car, and Weatherall testified there was no car within his view of the scene of the shooting. A hearsay story that the witness recants and which contradicts all the other evidence at trial does not constitute substantial evidence of the truth of the story.

Even if these three witnesses' statements were credited, no reasonable jury could conclude appellants actually believed in the need to defend themselves from imminent danger of death or great bodily injury or used a level of force that was reasonably necessary. Uncontradicted testimony indicated that Torres was shot eight times, including once in the back as he ran away, unarmed, and several times after he had fallen to the ground. No assailant could hold an honest belief in the need to defend himself by shooting an unarmed person four additional times as he runs away and after he falls. Therefore, under these circumstances no reasonable jury could have concluded appellants were entitled to an imperfect self-defense instruction.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

MOOR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.